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<b>C.H., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 16-1388</b>
	)	<b>Issued: March 17, 2017</b>
<b>U.S. POSTAL SERVICE, PROCESSING &amp;</b>	)	
<b>DISTRIBUTION CENTER, Philadelphia, PA,</b>	)	
<b>Employer</b>	)	
	)	

*Thomas R. Uliase, Esq.*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

On June 23, 2016 appellant, through counsel, filed a timely appeal from a March 23, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether appellant has established more than seven percent right upper extremity permanent impairment for which she previously received a schedule award.

## **FACTUAL HISTORY**

On August 13, 2013 appellant, then a 50-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on July 31, 2013 she sustained injuries to her right hand and fingers while in the performance of duty. She alleged that she was attempting to separate two containers and one fell on her right hand and fingers. OWCP accepted the claim for closed distal tuft fracture of the right index finger. Appellant stopped working on July 31, 2013.

On April 23, 2015 appellant submitted a claim for compensation (Form CA-7) and indicated that she was claiming a schedule award. She submitted a January 29, 2015 report from Dr. Nicholas Diamond, an osteopath, in support of her claim. Dr. Diamond provided a history and results on examination, including range of motion (ROM) for the right fingers. Based on loss of ROM in the right index, long, and ring fingers, he opined that appellant had 15 percent right upper extremity permanent impairment based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

OWCP referred appellant for a second opinion examination with Dr. Robert Smith, a Board-certified orthopedic surgeon. In a report dated April 25, 2014, Dr. Smith opined that appellant could return to full-duty work as a mail handler. Appellant returned to work and received wage-loss compensation through May 16, 2014.

OWCP referred the relevant evidence to an OWCP medical adviser. In a report dated July 8, 2015, the medical adviser, Dr. Arnold Berman, a Board-certified orthopedic surgeon, opined that appellant had seven percent right upper extremity permanent impairment. He found that the diagnosis-based impairment (DBI) methodology was proper in this case and that Dr. Diamond had included digits that were not accepted as employment related. Dr. Berman applied Table 15-2, the digit regional grid, and indicated that appellant had 39 percent right index finger permanent impairment. He concluded that under Table 15-11 this resulted in seven percent right upper extremity permanent impairment.

By decision dated October 21, 2015, OWCP issued a schedule award for 22.74 weeks of compensation commencing January 29, 2015. It described the permanent impairment as “Hand (Right) [eight percent], 1st Finger (Right) [seven percent].”

On November 4, 2015 appellant, through counsel, requested a hearing before an OWCP hearing representative. A hearing was held on February 17, 2016. Counsel argued that Dr. Diamond represented the weight of the medical evidence, or in the alternative, that a conflict between Dr. Diamond and Dr. Berman had been created.

By decision dated March 23, 2016, the hearing representative modified the October 21, 2015 decision to reflect seven percent right upper extremity permanent impairment, for 21.84 weeks of compensation. He found the DBI evaluation method was proper, as a rating based on

loss of ROM was appropriate only when no other approach was available. Dr. Berman was found to represent the weight of the medical evidence.

### **LEGAL PRECEDENT**

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.<sup>3</sup> Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.<sup>4</sup> FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.<sup>5</sup>

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled, “Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment*.” The document included various changes to the original text, intended to serve as an erratum/supplement to the first printing of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>6</sup> The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.<sup>7</sup>

### **ANALYSIS**

The issue on appeal is whether appellant has more than seven percent right upper extremity permanent impairment. Appellant submitted a January 29, 2015 report from Dr. Diamond opining that he had 15 percent right upper extremity permanent impairment based on the loss of ROM methodology for the evaluation of permanent impairment. An OWCP medical adviser, Dr. Berman, opined that appellant had seven percent right upper extremity permanent impairment, using the DBI methodology.

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<sup>3</sup> See 20 C.F.R. §§ 1.1-1.4.

<sup>4</sup> For a complete loss of use of an arm, an employee shall receive 312 weeks’ compensation. 5 U.S.C. § 8107(c)(1).

<sup>5</sup> 20 C.F.R. § 10.404. See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6a (February 2013); Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

<sup>7</sup> *Isidoro Rivera*, 12 ECAB 348 (1961).

The Board finds that this case is not in posture for decision.

The Board has found that OWCP has inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. No consistent interpretation has been followed regarding the proper use of the DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.<sup>8</sup> The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.<sup>9</sup> In *T.H.*, the Board concluded that OWCP physicians are at odds over the proper methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and district medical advisers use both DBI and ROM methodologies interchangeably without any consistent basis. Furthermore, the Board has observed that physicians interchangeably cite to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians are inconsistent in the application of the A.M.A., *Guides*, the Board finds that OWCP can no longer ensure consistent results and equal justice under the law for all claimants.<sup>10</sup>

In light of the conflicting interpretation by OWCP of the sixth edition with respect to upper extremity impairment ratings, it is incumbent upon OWCP, through its implementing regulations and/or internal procedures, to establish a consistent method for rating upper extremity impairment. In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the March 23, 2016 decision. Following OWCP's development of a consistent method for calculating permanent impairment for upper extremities to be applied uniformly, and such other development as may be deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an upper extremity schedule award.

### **CONCLUSION**

The Board finds that the case is not in posture for decision with respect to an upper extremity permanent impairment.

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<sup>8</sup> *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

<sup>9</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

<sup>10</sup> *Supra* note 8.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 23, 2016 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: March 17, 2017  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board